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January 2008

Character and Credit

Roger Bernhardt

The Future of Tenant Screening

I am reluctant to get too worked up in dealing with the two tenant screening decisions that are reported in this issue, since it seems inevitable that the players will devise responses to them to retile the playing field sufficiently as to render obsolete most of what I have to say.

The cases are *Trujillo v First Am. Registry, Inc.* (2007) 157 CA4th 628, 68 CR3d 732, and *Ortiz v Lyon Mgmt. Group, Inc.* (2007) 157 CA4th 604, 69 CR3d 66, reported at p 25 and p 24, respectively, both decided by Division Three of the Fourth Appellate District on December 3, 2007. Both were actions by tenants against credit reporting agencies based on the tenant screening reports they had issued; in both cases, the plaintiffs were defeated. The *Trujillo* parties lost on their claims under the Consumer Credit Reporting Agencies Act (CCRAA) (CC §§1785.1–1785.36) because they had filled out false applications and were held to have suffered no damages—the point I will spend most of this column discussing. In *Ortiz*, the defendant, an apartment management group, lost because its attempt to obtain certification as a class came too late, procedurally, and the plaintiff/tenant lost because the Investigative Consumer Reporting Agencies Act (ICRAA) (CC §§1786–1786.60) was held to be unconstitutionally vague in distinguishing between character information and creditworthiness information.

Much of the loss in these cases can be blamed on blunders by the plaintiffs: They presented a class of apartment seekers whose rental applications had been allegedly rejected based on incorrectly reported previous unlawful detainer actions. However, in *Trujillo*, one had misstated the number of previous bankruptcies he had filed; another had falsely represented that he had never been subject to an unlawful detainer action; and the third was shown to have had independently bad credit. Obviously, sooner or later, competent counsel will be able to find better-suited tenant representatives to overcome these trivial hurdles.

Likewise, the constitutionally infirm gap between the two statutes that controlled *Ortiz*—since it was created by inadvertence in the first place—will surely be corrected by ameliorative legislation in the near future. The problem is not so much, however, of forcing the legislature to take a stand as to which act best applies to unlawful detainer reports (because it is obvious that landlords want both creditworthiness and character information about their applicants): It is as important to them to know whether a prospective tenant ruined his neighbor's peace and comfort by playing the saxophone all night or dealing drugs in the apartment as it is to know whether he was always late with the rent. Given these needs, we may well end up with a new statute: a CC&CRAA (Consumer Credit and Character Reporting Agency Act) that bridges the chasm between our present statutes. Indeed, it may be decided that unlawful detainers are so unique that a freestanding “UDRAA” should exist on its own.

But those are the easy fixes. The heart of the problem—and the barrier that tenants may find insurmountable—is that the cases were lost because the courts held that the plaintiffs suffered no

damage from the incomplete tenant screening reports that their applications generated, based on the evidence presented by the defendants.

Basically, the defendants won *Trujillo* because the property managers—who were the ones who had ordered the reports—“asserted they would have rejected the applications even if the tenant screening reports had accurately indicated the unlawful detainer actions had been dismissed ... or the resulting judgment had been satisfied.” 157 CA4th at 634. If the tenants would have been turned down even with more reliable reports, they were ipso facto not harmed by reports that were unreliable.

Now, that was a very clever strategy. The CCRAA in fact prohibits a credit reporting agency from reporting unlawful detainers “unless the lessor was the prevailing party,” defined as one who got a judgment, a summary judgment, or a settlement that provided for its reporting. CC §1785.13(b)(3). (A similar provision appears in the ICRAA; see CC §1786(a)(4).) That meant, of course, that the agencies’ reports of UD’s that had merely been filed—as is often the case—were facially in violation of the Act, and the class action lawyers could have had a field day if that was all there was to it.

It was the property managers who saved the skins of the credit agencies by averring that incomplete information was all they wanted in the first place (abetted in this stratagem by the landlords who gave the property managers written policy instructions to do exactly the kind of incomplete job that they were doing). That kind of back-up defense took the screening agencies off the hook—their incomplete reports may have violated the statute, but they caused no harm, since their customers did not want the whole story to begin with.

At first, I wondered why the landlords and property managers were acting so heroically about rescuing the screening agencies. But as I thought about it, I began to realize that there was probably no personal cost involved in that heroism. What exactly is there in California jurisprudence that deters a landlord from saying that she does not want to consider a tenant who was previously subject to an unlawful detainer action? Our Fair Housing Act prohibits discrimination based on “race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, familial status, source of income, or disability” (Govt C §12955(a))—but none of those categories appears to include litigiousness. Landlords may be barred from retaliating against troublemaking tenants (see CC §1942.5), but they do not have to let them in as tenants in the first place if they think they are troublemakers.

The Unruh Civil Rights Act (CC §51), which has a slightly different list of protected classes than the Fair Housing Act (adds medical condition and drops source of income as a category), is sometimes said to generally prohibit arbitrariness of any kind. But I do not think that it compels a landlord to rent to a tenant previously named in an unlawful detainer action. Income requirements have survived Unruh Act challenges (*Harris v Capital Growth Investors XIV* (1991) 278 CR 614, 52 C3d 1142), and not having been evicted looks pretty similar to not being poor.

The thrust of the plaintiffs’ challenges in these actions was not that their clients had been wrongly evicted previously, but that the reports failed to show that the disclosed eviction actions had not been successful. Is it arbitrary, then, under the Unruh Act to turn down tenants without knowing that ultimate fact? A 2007 Yale Law Journal article (yes, we law professors have to read those things) quotes one screener as saying “[i]t is the policy of 99 percent of our [landlord] customers in New York to flat out reject anybody with a landlord tenant record, no matter what

the reason is and no matter what the outcome is, because if their dispute has escalated to court, an owner will view them as a pain.” Kleysteuber, *Tenant Screening 30 Years Later: A Statutory Proposal To Protect Public Records*, 116 Yale LJ 1344, 1347 (Apr. 2007). That must be equally true in California, at least in our crowded urban markets. If taking that position is the custom and practice of most landlords, are our judges likely to find it irrational or arbitrary?

In light of how these cases were successfully defended, it will not be easy for the legislature to solve this problem with new legislation, even if it is sympathetic to the tenants. It cannot require the screening agencies to report more fully, since that is already required of them but has been rendered superfluous by landlords’ indifference to the missing information. Can it require the landlords to insist on information they do not want? Can it insist that they then read it? Finally, can it insist that these landlords act differently because of the rest of the information?

Currently, there are some restrictions on what kind of “adverse actions” (defined in CC §1785.3(a)) a purchaser of a screening report can take, but none relates to accepting a tenant’s application for a rental unit. Perhaps the definition of adverse action could be broadened to include tenant rejection, but how could that operate in crowded rental markets where there are multiple applications for each available unit? Would a landlord be compelled to select the application of a previously unlawfully detained tenant over that of some other tenant, because, *e.g.*, it was submitted first? Would a just cause rejection letter have to be sent to each unsuccessful applicant, explaining that his previous UD history was not the real reason for preferring another applicant over him? Would an administrative hearing follow?

As for class actions, they could be made more successful if the credit reporting acts substituted a statutory penalty for actual damage compensation, since that would wipe out the defense that worked so effectively in these cases. It would also force the screening agencies to do more. Whether they could do so within the confines of the \$30 screening fee they are currently allowed to charge (CC §1950.6(b)) is a wholly different question that I do not have to answer.

Ortiz v Lyon Mgmt. Group, Inc. (2007) 157 CA4th 604, 69 CR3d 66

Ortiz applied to rent an apartment managed by Lyon Management Group (Lyon) and gave Lyon written consent to obtain a tenant screening report, including an unlawful detainer search. The report indicated that no unlawful detainer actions had been filed against Ortiz, who moved into one of Lyon’s apartments.

Ortiz, individually and on behalf of a class of similarly situated persons, sued Lyon for violating the Investigative Consumer Reporting Agencies Act (ICRAA) (CC §§1786–1786.56), alleging that Lyon failed to give her written notice and a report requesting form, as required by CC §1786.16(a)(3), (b)(1). The trial court granted Lyon’s motion for summary judgment, finding that the tenant screening report contained no character information subject to the ICRAA. Thereafter, Lyon moved for class certification, which the court denied.

The court of appeal affirmed. Ortiz contended that her tenant screening report contained character information because it indicated whether any unlawful detainer actions had been filed against her. On an issue of first impression, the court held that the ICRAA is unconstitutionally vague as applied to tenant screening reports containing unlawful detainer information because reasonable persons cannot readily determine whether unlawful detainer information constitutes

character information governed by the ICRAA or creditworthiness information governed by the Consumer Credit Reporting Agencies Act (CCRAA) (CC §§1785.1–1785.36).

The statutory scheme, consisting of two distinct statutes governing two kinds of tenant screening reports depending on the type of information they contain, indicates a legislative intent to distinguish between creditworthiness information and character information. Nothing in the statutes suggests that any one item of information may constitute both creditworthiness and character information, subjecting a tenant screening report to both statutes; a single item of information may be classified as either creditworthiness or character information, but not both. The legislature demanded that the two types of information be distinguished when classifying tenant screening reports as subject either to the CCRAA or the ICRAA.

At the same time, the legislature recognized the inherent overlap between creditworthiness information and character information. Each statute expressly excludes from its ambit any reports containing only information covered by the other. Those exclusions show that, in their absence, the information covered by the other statute would also be covered by it.

Although the statutory scheme makes it relatively simple to categorize a traditional credit report as subject to the CCRAA, not the ICRAA, unlawful detainer information can be categorized under both statutes because it pertains to both creditworthiness and character. Unlawful detainer information most commonly reveals allegations concerning the untimely payment of rent; timely payment of obligations relates to creditworthiness. Unlawful detainer actions may also be based on holding over after lease expiration, breach of a lease covenant, commission of waste, or maintenance of a nuisance—acts that may suggest character traits. Adding to the confusion, good counter arguments can be made to these classifications: Renting an apartment is not truly a credit transaction, because a landlord neither sells property on time nor makes funds available to tenants, and breach of contract is an act to which the law ordinarily assigns no moral blameworthiness.

Thus, there is no rational basis on which a person of ordinary intelligence can determine whether unlawful detainer information constitutes creditworthiness information subject to the CCRAA or character information subject to the ICRAA. Credit reporting agencies and landlords must necessarily guess at the ICRAA’s meaning and differ as to its application. The ICRAA thus fails to provide adequate notice to persons who compile or request tenant screening reports that contain unlawful detainer information and is unconstitutional as applied to such reports.

The court also held that the trial court correctly denied class certification because Lyon had already obtained adjudication of the merits of Ortiz’s individual claim. Postmerits certification requires a showing of changed circumstances and a compelling justification (*Fireside Bank v Superior Court* (2007) 40 C4th 1069, 56 CR3d 861), which were absent here.

Trujillo v First Am. Registry, Inc. (2007) 157 CA4th 628, 68 CR3d 732

Tenants sued First American Registry, alleging that it had prepared tenant screening reports that correctly showed unlawful detainer actions had been filed against them, but wrongly failed to note the actions had been dismissed or the resulting judgment had been satisfied, and that these incomplete reports had caused property managers to reject their rental applications. They claimed violations of the Consumer Credit Reporting Agencies Act (CCRAA) (CC §§1785.1–1785.36), the Unfair Competition Law (UCL) (Bus & P C §§17200–17210), and the Investigative Consumer Reporting Agencies Act (ICRAA) (CC §§1786–1786.60). The trial court

granted defendant summary adjudication on each of the causes of action, finding that plaintiffs had not suffered damage or injury from the alleged statutory violations.

The court of appeal affirmed. Plaintiffs alleged defendant violated the CCRAA's requirement to follow reasonable procedures ensuring accurate credit reports (CC §1785.14(b)) because their tenant screening reports failed to reflect that their unlawful detainer actions had been dismissed. However, plaintiffs failed to show that they suffered damages as a result of the violation, as required by CC §1785.31(a). The undisputed evidence showed that the property managers would have rejected plaintiffs' applications even if the tenant screening reports showed the unlawful detainer actions had been dismissed. The CCRAA claim failed as a matter of law because plaintiffs suffered no actual damage.

Actual damage, not "inherent harm" as plaintiffs contended, is required to state a CCRAA claim. Nor were plaintiffs excused from proving actual damage because they sought injunctive relief or punitive damages. Injunctive relief under CC §1785.31(b) is expressly limited to consumers who have been "aggrieved," *i.e.*, consumers who have been actually injured. Actual damage is a prerequisite to recovering punitive damages.

Similarly, plaintiffs did not raise a triable issue as to whether they suffered injury in fact or lost money or property as a result of unfair competition, as required for standing to assert a UCL claim. Bus & P C §17204; *Californians for Disability Rights v Mervyn's, LLC* (2006) 39 C4th 223, 228, 46 CR3d 57.

The ICRAA claim failed because the ICRAA is unconstitutionally vague as applied to tenant screening reports containing unlawful detainer information. It governs reports containing "information on a consumer's character, general reputation, personal characteristics, or mode of living." CC §1786.2(c). Plaintiffs asserted their tenant screening reports were subject to the ICRAA because the reports indicated unlawful detainer actions had been filed against them and thus contained "character information." In a companion case, the court of appeal held that the ICRAA is unconstitutionally vague because persons of reasonable intelligence cannot determine whether unlawful detainer information is character information subject to the ICRAA or creditworthiness information subject to the CCRAA. *Ortiz v Lyon Mgmt. Group, Inc.* (2007) 157 CA4th 604, 69 CR3d 66.